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Supreme Court, U.S.
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NO. 93-915

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES LADWIG

Petitioner

versus

COMMONWEALTH OF KENTUCKY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE KENTON COUNTY KENTUCKY
CIRCUIT COURT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE KENTON COUNTY KENTUCKY CIRCUIT COURT CORRECTLY DECLINED TO REVERSE PETITIONER'S CONVICTION AND GRANT HIM A NEW TRIAL BASED ON THE SIXTH AMENDMENT'S RIGHT TO TRIAL BY JURY WHERE PETITIONER WAS REPRESENTED BY COUNSEL, ABOUT WHOM COMPLAINT HAS NEVER BEEN MADE, AND A REQUEST FOR A JURY WAS NEVER MADE AT ANY STAGE OF THE PROCEEDINGS IN THE STATE TRIAL COURT.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii-iv
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2-7
SUMMARY OF THE ARGUMENT	7-8
ARGUMENT	8-19
CONCLUSION	19-20

TABLE OF AUTHORITIES

Page

CASES:

Boykin v. Alabama,
295 U.S. 238 (1969) ---------- 15

Carnley v. Cochran,
369 U.S. 506 (1962) ---------- 17

Fay v. Noia,
372 U.S. 391 (1963) ---------- 9

Francis v. Henderson,
425 U.S. 536 (1976) ---------- 12

Irwin v. Veterans Administration,
498 U.S. ___ (1990) ---------- 14

Johnson v. Zerbst,
304 U.S. 458 (1938) ---------- 17

Kiper v. Commonwealth,
415 S.W.2d 92, 94 (Ky. 1967) ---------- 19

Levine v. United States,
362 U.S. 610, 619 (1960) ---------- 12

Link v. Wabash Railroad Co.,
370 U.S. 626, 634 (1962) ---------- 13

Patton v. United States,
28 U.S. 276, 312-313 (1930) ---------- 17

Peretz v. United States,
501 U.S. ___ (1991) ---------- 12

Rice v. Sioux City Memorial Park
Cemetery, 349 U.S. 70 (1955) ---------- 9

Segurola v. United States,
275 U.S. 106, 111 (1927) ---------- 12

Singer v. United States,
380 U.S. 24, 36 (1965) ---------- 18

Strickland v. Washington,
446 U.S. 668, 690 (1984) ---------- 14

Thompkins v. United States,
251 A.2d 636 (D.C. App. 1969) ---------- 16

United States v. Cronic,
466 U.S. 648, 658 (1984) ---------- 14

United States v. Gagnon,
47 U.S. 522 (1985) ---------- 13

Yakus v. United States,
321 U.S. 414 (1944) ---------- 11

KENTUCKY REVISED STATUTES:

K.R.S. 29A.270(1) ---------- 10

K.R.S. 508.030 ---------- 3

K.R.S. 508.080 ---------- 3

K.R.S. 532.090 ---------- 3

Kentucky Rule of Criminal
Procedure 11.42 ---------- 19

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OPINION BELOW

The opinion of the Kenton County Kentucky Circuit Court is correctly set forth in slip form in the petitioner's appendix to his petition.

JURISDICTION

The jurisdictional facts presented by the petitioner are correct.

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner correctly states the constitutional provisions involved in this case.

COUNTERSTATEMENT OF THE CASE

This case arose as the result of petitioner's criminal actions on Wednesday, December 18, 1991, at the United Methodist Church at Lakeside Park in Kenton County, Kentucky. The petitioner is married to the ex-wife of the victim in this case, Mark Modlin. The victim and his ex-wife share a child, Bryson Modlin, who in 1991 was five years of age. In a dispute over the child on December 18, 1991 petitioner assaulted the victim and threatened him. The physical injuries inflicted by the petitioner upon the victim in this case were serious enough to require medical care and treatment.

BEST AVA

As a result of the events of December 18, 1991 the petitioner was charged by way of criminal complaint with the crime of assault in the fourth degree in violation of Kentucky Revised Statute 508.030 and terroristic threatening in violation of Kentucky Revised Statute 508.080. Pursuant to Kentucky Revised Statute 532.090 both offenses carried a maximum sentence of imprisonment of twelve months in jail.

The petitioner was subsequently arraigned before the Kenton District Court on or about January 29, 1992. On February 5, 1992 an order was entered by the Kenton Circuit Court appointing the Honorable C. Donald Wells to preside over the pending criminal case as a special judge and scheduled the matter for trial commencing on March 4, 1992 at 10 a.m. However, on March 4, 1992 the case did not proceed to trial as previously ordered and was diverted for possible mediation. However, attempts at

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mediation of the matter proved unsuccessful as on August 9, 1992 an order was entered in the Kenton District Court setting the case for trial on Thursday, September 24, 1992 before the Kenton District Court.

On September 24, 1992 and September 25, 1992 this case was tried before the Honorable C. Donald Wells without a jury. The petitioner was ultimately acquitted of the crime of terroristic threatening but was adjudged guilty of the crime of assault in the fourth degree as defined by Kentucky law.

Final judgment and sentence of the Kenton District Court was entered on November 13, 1992. The Kenton District Court adjudged petitioner guilty of the offense of assault in the fourth degree in violation of Kentucky Revised Statute 508.030 and sentenced him to 100 days in jail and imposed a $500 fine. The trial court entered a conditional discharge and probation order, ordering the petitioner to

spend 84 hours in jail and to perform 50 hours of community service. Further, petitioner was placed on probation for two years, to be on supervised probation for three months, was further ordered to pay the costs of his supervision, was directed to pay $17.50 per day for his four days in jail, and was ordered to initiate no contact or communication with the victim in this case, Mark Modlin.

At that juncture, petitioner initiated his one appeal as a matter of right to the Kenton County Kentucky Circuit Court from the judgment of the inferior trial court. Sitting as an appellate court for purposes of the direct appeal of petitioner's misdemeanor conviction, the Kenton County Kentucky Circuit Court rejected petitioner's claim that petitioner was entitled to a new trial in the Kenton County Kentucky District Court since the case was tried without a jury. In rejecting petitioner's complaint, the Kenton County Kentucky Circuit

Court observed that petitioner "was represented by an attorney at all stages of these proceedings. He never requested a jury trial. He announced ready for trial at the call of his case for trial. With the appellant's concurrence, he was tried by the court and was found guilty. He cannot complain because the results of the bench trial were not to his advantage." (Petitioner's Appendix, 2a-3a). The Kenton County Kentucky Circuit Court also rejected petitioner's claims that the evidence presented at his bench trial was insufficient to support a finding that he intended to cause physical injury to the victim - an essential element of the crime of assault in the fourth degree. (Petitioner's Appendix, 4a-5a).

The Court of Appeals of Kentucky subsequently denied the petitioner's motion for a discretionary review of the decision of the Kenton County Kentucky Circuit Court in an order entered on April 8, 1993. Thereafter, the

Supreme Court of Kentucky denied the petitioner's request for a discretionary review of this case in an order entered on August 25, 1993. Undeterred, petitioner's petition for a writ of certiorari to review the judgment of the Kenton County Kentucky Circuit Court in this Court then followed.

Additional facts shall be developed, as warranted, in the Argument section of this brief in opposition to the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

Petitioner has never complained that he in fact wanted something other than a bench trial. He simply argues that the record fails to reflect a waiver of his right to a jury to decide his case that would exist if he had decided to forego all his constititutional rights by entering a plea of guilty. The state courts declined to reverse the conviction and order a new trial since petitioner's attorney,

about whom complaint has never been made, failed to make a request for a jury prior to commencement of the bench trial or raise the issue by way of trial objection or post-trial motion. Petitioner is bound by the acts of his attorney, whom the law strongly presumes was acting as able and competent counsel.

ARGUMENT

THE PETITIONER HAS FAILED TO DEMONSTRATE THAT THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE KENTON COUNTY KENTUCKY CIRCUIT COURT.

The petitioner has failed to demonstrate that there are special and important reasons why this Court ought to grant a writ of certiorari to review the unpublished judgment of the Kenton County Kentucky Circuit Court. The petition for a writ of certiorari fails to demonstrate why this Court ought to exercise its discretion in favor of granting the writ since the petition fails to demonstrate that there are

special and important reasons therefor. Fay v. Noia, 372 U.S. 391 (1963); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955).

In this case, petitioner does not argue that the Kentucky trial court incorrectly denied his request for a trial by jury. In fact, he does not even argue that he actually desired a trial by jury in the Kenton County Kentucky District Court. Nowhere in his petition is there any claim that he ever wanted something other than a bench trial. Instead, he claims that the Kentucky courts in his direct appeal should have granted him a new trial simply because there was no record of an express waiver of the right to trial by jury akin to that which would be found in the record of a case when a criminal defendant foregoes all of his constitutional rights by entering a plea of guilty. For the reasons that follow, the Commonwealth shall demonstrate that petitioner's argument is without merit.

At the outset, the Commonwealth recognizes that it is undisputed that the petitioner had the right to the trial of his case in the Kenton County Kentucky District Court by a jury of his peers had he so requested. Pursuant to Kentucky Revised Statute 29A.270(1) petitioner was entitled to "request a jury trial at any time prior to the time his case is called for trial." In this case, petitioner never once made any request, either written or oral, for a trial by jury as was his right before his case was called for trial. Nor did he make any sort of objection in the record wherein he objected to proceeding to trial without a jury. Further, the record is devoid of any sort of post-trial motion wherein petitioner raised any complaint at all about trying his case before the trial judge without a jury in the Kenton County Kentucky District Court. There was never any assertion of the right to a trial by jury, in either the form of

a pre-trial request or trial objection or post-trial motion, despite the fact that it is undisputed that petitioner was represented by experienced counsel at all times throughout the proceedings in the Kenton County Kentucky District Court.

That the Kentucky appellate courts declined to award petitioner a new trial based on his claim is hardly surprising given the facts and circumstances of this case. As this Court has observed, "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." Yakus v. United States, 321 U.S. 414, 444 (1944). The principle that a constitutional right may be forfeited in a criminal case by the failure to make a timely assertion of that right is just as applicable in state court proceedings

as it is in cases in the federal courts. Francis v. Henderson, 425 U.S. 536 (1976).

The principle recognized by this Court in Yakus has been consistently observed in subsequent decisions by this Court. A defendant in a criminal case has no constitutional right to have an Article III judge preside at his jury selection if he has raised no objection to the judge's absence. Peretz v. United States, 501 U.S. ___ (1991). The most basic constitutional rights of criminal defendants are subject to waiver. Levine v. United States, 362 U.S. 610, 619 (1960)(failure to object to closing of courtroom is waiver of right to public trial); Segurola v. United States, 275 U.S. 106, 111 (1927)(failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure).

Surely no right is more basic than the right of a criminal defendant to be physically present at all stages of a criminal trial. This

Court, in United States v. Gagnon, 47 U.S. 522 (1985) recognized that the failure by a defendant to invoke his right to be present constitutes a valid waiver of that right. This Court recognized that such an analysis comports "with the every day practicalities of conducting a trial." Gagnon, at 529. A defendant must assert his claim during the trial proceedings and may not raise it for the first time on appeal following the entry of a final judgment of conviction. (Id.).

The fundamental principle set out in Yakus that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of that right more than fifty years ago is particularly applicable to this case since petitioner was represented by counsel throughout the proceedings in the state trial court. In our system of representative litigation, each party is bound by the acts of his lawyer-agent. Link

v. Wabash Railroad Co., 370 U.S. 626, 634 (1962); Irwin v. Veterans Administration, 498 U.S. ____ (1990). That principle is no less applicable to this case simply because this is a criminal case. There exists a presumption in criminal cases that a defendant's attorney is conscious of the duties to his accused client and that the attorney conscientiously endeavored to discharge his obligation in a competent manner. United States v. Cronic, 466 U.S. 648, 658 (1984). There is in our law a strong presumption that an attorney is "presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 446 U.S. 668, 690 (1984). Significantly, the petitioner has never alleged that his attorney's performance was so constitutionally deficient in the state trial court that it resulted in a deprivation of his right to a trial by jury. Instead, he has never

made any complaint about his attorney's performance and simply continues to allege that he should have been granted a new trial because the record was devoid of the sort of showing necessary when a defendant enters a plea of guilty and foregoes all of his constitutional rights.

Petitioner's reliance upon Boykin v. Alabama, 295 U.S. 238 (1969) is misplaced. Petitioner contends that Boykin required the Kentucky courts to provide him a new trial since the waiver of a trial by jury required the same sort of showing required when a defendant waives all of his rights by entering a plea of guilty. Boykin involved a situation where a criminal defendant was giving up each and every one of his federal constitutional rights pursuant to a plea of guilty and was ultimately sentenced to death therefor. That situation is a far cry from the situation in this case where the petitioner was represented by competent and

experienced counsel throughout every stage of the proceedings in the state trial court.

It is one thing when a defendant short circuits the legal process altogether by entering a plea of guilty and quite another when he simply fails to timely assert one of his many constitutional guarantees when represented by competent and able counsel during the trial proceedings. The sort of "everday practiclaties of conducting a trial" considered critical in Gagnon counsel against the notion advanced by petitioner that everytime a defense attorney foregoes a trial right grounded in the constitution there must be an express personal waiver of that right by the defendant himself. Since "[a] waiver of trial by jury is usually for tactical reasons when a defendant is represented by counsel", Thompkins v. United States, 251 A.2d 636 (D.C. App. 1969), this Court ought not ignore the important fact that

petitioner was represented by counsel about whom complaint has never been made.

Petitioner's reliance upon Johnson v. Zerbst, 304 U.S. 458 (1938) and Carnley v. Cochran, 369 U.S. 506 (1962) is equally misplaced as those cases involved situations where there was no adequate showing in the record as to the waiver of the right to counsel. In this case, petitioner was represented by counsel whose performance is strongly presumed to have been competent and conscientious and about whom complaint has never been made Petitioner's attempt to rely upon language found in Patton v. United States, 28 U.S. 276, 312-313 (1930) regarding the waiver of a jury is also without merit. The language relied upon by petitioner must be understood in light of the supervisory power of this Court over the lower federal courts since this Court has recognized "that the states have adopted a variety of procedures relating to the waiver of

jury trials in state criminal cases." Singer v. United States, 380 U.S. 24, 36 (1965). Complaint has never been made by the petitioner about his attorney's performance or that somehow the trial court impermissibly deprived him of his constitutional right to a trial by jury. Instead, he simply complains that the same sort of showing should be made on the record in this case as would be made if he had decided to forego all of his federal constitutional rights by entering a plea of guilty. Given the nature of the petitioner's allegations on appeal in the state courts it is hardly surprising that the state courts declined to grant petitioner a new trial in the Kenton County Kentucky District Court.

If petitioner believes that his attorney's performance was so constitutionally deficient that it resulted in the deprivation of his right to a trial by jury or that somehow the trial court itself impermissibly deprived him of

his right to a trial by jury then he is still entitled to raise such allegations by way of a collateral attack on the criminal judgment pursuant to Kentucky Rule of Criminal Procedure 11.42. It is well settled that Kentucky's procedure for collateral attacks on a criminal conviction permit litigation of claims involving an alleged violation of a constitutional right. Kiper v. Commonwealth, 415 S.W.2d 92, 94 (Ky. 1967). Based on the record on appeal in the direct appeal the Kentucky courts, not surprisingly, declined to grant a new trial since the record reflected that petitioner was represented by competent and able counsel and that no request for a trial by jury was ever made by way of a pre-trial motion, a trial objection, or a post-trial motion.

CONCLUSION

For the foregoing reasons the Commonwealth respectfully submits that the petition for a writ of certiorari to the Kenton

County Kentucky Circuit Court be denied. Review by this honorable Court is not warranted as petitioner has failed to demonstrate special and important reasons for this Court to exercise its discretion in favor of granting a writ of certiorari.

Respectfully submitted,

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